

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2037

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT OF NEW YORK

HERBERT SPERLING,

PETITIONER-APPELLANT,

-against-

DOCKET No. 77-2037

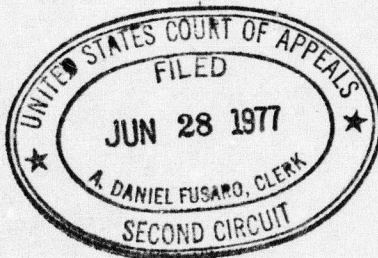
UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

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PETITIONER-APPELLANT'S PRO SE
BRIEF ON APPEAL

DATED: This 24 day of June, 1977.



Respectfully submitted,

Herbert Sperling

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

PETITIONER-APPELLANT'S PRO SE
BRIEF ON APPEAL

ISSUES PRESENTED FOR REVIEW

1. Whether the due process clause to the Fifth Amendment was violated when before the vacature of a plea of guilty, in 1971, the hearing court bargained and imposed conditions as a prerequisite to the vacature of an invalid plea of guilty entered in 1959; and whether the 1971 hearing court can accept a replea of guilty without first establishing a factual basis for the plea as required by Rule 11 without further violating due process concepts?

2. Whether under the totality of circumstances test it is a denial of due process of law for the lower court to rely on the harmless error doctrine as a means to deny relief without holding an evidentiary hearing?

PRELIMINARY STATEMENT

This is an appeal from an order entered on February 4, 1977, in the Eastern District of New York, Platt, D.J., denying without a hearing the petitioner's pro se Sec. 2255 motion seeking vacature of a guilty plea entered before Judge Costantino on November 4, 1971, on the grounds that the court coerced the petitioner into entering an involuntary plea of guilty through a process of judicial plea bargaining; and because the trial court failed to establish a factual basis for the acceptance of the plea of guilty, all in violation of Rule 11, Federal Rules of Criminal Procedure. Reargument was duly sought on February 10, 1977, and on February 28, 1977, a Supplemental Memorandum And Order was filed denying reargument.

Notice Of Appeal was duly submitted on March 22, 1977, along with filing fee thereto. Docketing fee was paid to this Court by the petitioner's mother, Mrs. C.S. Sperling, on March 30, 1977. Appeal briefs together with appendices are to be submitted by June 29, 1977. Therefore this appeal is now properly before this Court.

BACKGROUND AND INTRODUCTION

The genesis of the instant appeal has its roots in a proceeding before the late Judge Zavatt on September 22, 1959, when the petitioner entered a plea of guilty to seven counts of indictment number Cr. 45869. The indictment contained numerous counts alleging violations of the narcotics laws, 21 U.S.C. Sec's. 173, 174.

The 1959 plea of guilty was subsequently attacked in 1971 via 28 U.S.C., Sec. 2255, which culminated in the vacature of the 1959 proceedings and the entry of a new plea of guilty. This latter plea formed the foundation for the Sec. 2255 motion that is the subject of the instant appeal.

The 1971 Sec. 2255 Motion,
And The Proceedings Thereto.

On September 3, 1971, Michael L. Santangelo, Esq., 253 Broadway, New York, New York 10007, submitted a motion to vacate the judgment of conviction and sentence in the 1959 proceedings because the petitioner's plea of guilty had been entered in violation of Rule 11, Federal Rules of Criminal Procedure. The petition alleged that the petitioner had not been informed of his ineligibility for parole under the then existing narcotic laws; and that the petitioner had been induced by his 1959 attorney, Robert Mitchell, to enter the guilty plea under the promise that the 1959 sentencing court would run the sentence concurrently with another federal sentence that the petitioner was then serving as a youthful offender. (Appendix, p.3). In support of these claims Mr. Santangelo submitted an affidavit from Robert Mitchell. (Appendix, p. 7).

The motion papers were referred to Judge Costantino who indicated to the petitioner's attorney, Mr. Santangelo, that the motion would be granted upon one "condition"; the petitioner's "conviction would not be set aside nor would the Court consent to

a withdrawal of the plea of guilty unless the petitioner immediately thereafter enter a plea of guilty to the same crime to which he had previously pleaded guilty." (Appendix, p.10, Affidavit of Michael L. Santangelo).

The petitioner was further informed by Mr. Santangelo that he had been engaged in plea bargaining with the hearing court and that Judge Costantino had promised to impose a sentence of time served immediately after the petitioner re-entered a plea of guilty. (Appendix, p.23).

On the actual day of the withdrawal of the plea of guilty, November 4, 1971, Santangelo apprised the petitioner that the hearing court had reconsidered its former promise of time served to include "time served plus four months." And that if the petitioner declined to accept these terms Judge Costantino would "deny the motion to vacate the plea and let him (the petitioner) take it upstairs", and that by the time he obtained appellate review "he would have the four months in anyway." (Appendix, p.24, Petitioner's Affidavit to the court below).

No efforts were made by Judge Costantino to determine the veracity of the petitioner's second claim, i.e., that he had been promised to receive a concurrent sentence with the sentence that he was then serving as a youthful offender, and which in fact was ordered to run consecutively by Judge Abruzzo, on February 19, 1960. The petitioner was then an uneducated nineteen year old youth.

The 1976 Sec. 2255 Motion,
And The Proceedings Thereto.

On October 26, 1976, the petitioner submitted a second motion pursuant to Title 28 U.S.C., Section 2255, in a pro se capacity, which sought to vacate the plea of guilty entered before Judge Costantino on November 4, 1971. The motion was referred to Hon. Thomas C. Platt, D.J. (Appendix, p. 22). And on December 6, 1976, a show cause order was issued. (Appendix, p. 45).

On January 21, 1977, the petitioner received the Government's opposition in the form of a memorandum of law. (Appendix, p. 50). Appended to these papers were the petitioner's motion in 1971 to withdraw the plea entered in 1959 and an affidavit from petitioner's 1959 attorney, Robert Mitchell. (Appendix, pp. 3, 7).

The Government did not submit any opposing affidavits from Judge Costantino nor from the then Assistant United States Attorney. The Government, instead, advanced reasons in an attempt to justify Judge Costantino's active role in plea bargaining, as well as for his failure to ascertain a basis for the acceptance of the 1971 plea of guilty as required by Rule 11.

On January 23, 1977, the petitioner submitted an affidavit in the form of a traverse to the Government's opposing papers. (Appendix, p. 68). And on February 4, 1977, Judge Platt issued a

memorandum and order denying without a hearing the petitioner's application to vacate the 1971 guilty plea. (Appendix, p.72). The Court deemed the petitioner's "alleged errors.....harmless beyond a reasonable doubt". (Appendix, p.75).

The petitioner sought reargument on February 10, 1977, (Appendix, p.77), which was denied on February 28, 1977. (Appendix, p.82).

POINT I

IT IS AXIOMATIC THAT JUDICIAL PLEA BARGAINING DOES VIOLENCE TO THE BASIC SAFEGUARDS OF THE FIFTH AMENDMENT CLAUSE THAT GUARANTEES DUE PROCESS OF LAW, AND THAT RULE 11 REQUIRES THAT THE COURT ESTABLISH A FACTUAL BASIS FOR THE ACCEPTANCE OF THE PLEA.

The instant appeal presents vital and important principles that have an effect on the very matrix of our American system of justice. They arise in the setting of the propriety of judicial plea bargaining, as it occurred in the case at bar. And embraces a subject that has recently been the focus of the legislative rule making process (Rule 11(e), Federal Rules Of Criminal Procedure), and which has been condemned by this Court in United States V. Werker, 535 F.2d 198 (1976). Also involved in the instant appeal is the court's failure to establish a basis for the acceptance of the guilty plea. Concededly, the present appeal seeks a favorable ruling in this regard as to a proceeding that occurred in 1971. For this reason the petitioner respectfully submits that it may prove

helpful to review past decisional law in this area, and in some instances to even turn to history, because in many cases "(t)he history of what the law has been is necessary to the knowledge of what the law is." (Lerner, The Mind And Faith Of Justice Holmes, p. 55 (1943)).

From the very outset the petitioner respectfully submits that to the public mind and conscience the judge is the trustee of impartial justice. Only through much struggle and effort that has spanned the centuries has the judge been elevated to that enviable plateau that guarantees him independence and freedom from reprisal by a king, legislature, mob, or disgruntled litigants. (See Pierson V. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967)). The courtroom is his dominion. He sits as the undisputed fountainhead of justice. Managing the proceedings before him, he administers and he makes rulings that have the awesome power of the Government behind them. He is vested with the power to punish on the spot as contempt any departure from the orderly process that tends to besmirch or ridicule his person or office. There is no other civil officer clothed with such summary power. Hence, this Court should rule on the disquieting questions presented in the case at bar

It is indisputable that a trial court has the power to apprise a defendant of the statutory range mandated by a particular statute. This, however, is not the situation in the case at bar. Here we are squarely faced with a proceeding wherein Judge Costantino

had a motion before him that alleged a Rule 11 violation of an unintelligently and involuntary plea of guilty that was entered before a different judge in 1959. An additional claim of an unfulfilled promise was made. (Appendix, p. 3). The motion obviously had merit because Judge Costantino decided to grant it. However, before granting the motion the judge initiated efforts to secure the entry of a guilty plea immediately following his vacature of the former invalid plea--under the threat of refusing to vacate the invalid plea if the petitioner did not agree to his "conditions"--completely ignoring the relevancy of the unfulfilled promise alleged in the petitioner's motion. Thus the petitioner was divested of that free will necessary to a plea of guilty, by judicial interference.

In this context, and by analogy, it is respectfully submitted that interfering with a duly constituted judicial proceeding was condemned as far back as 1616, when King James I "attempted to interrupt the trial of the case which was going on before all the judges of the common law courts of the exchequer chamber, in order to hold a consultation with the judges about it. On their unanimously refusing to delay as contrary to law, they were summoned before the King and the council and severely rebuked by James in person. All humbly submitted except Coke, who still declared the delay as contrary to law. They were then required to say whether they would not delay a case before them to consult with the King

if he judged his interests directly involved in it. All agreed except Coke, who would say only that he would do what was proper for a judge to do." (Adams, Constitutional History of England, p. 276 (1934), emphasis added, referring to the Commendams case known also as Colt and Glover V. The Bishop of Coventry (S-M. No. 91 F, pp. 442-43 (1616); see Knappen, Constitutional And Legal History Of England, pp. 365-66 (1942)).

We can thus see that interfering with a duly sanctioned judicial proceeding was condemned in a despotic king despite the fact that he had a personal interest in the outcome of the case. Can the requirements be any less in a judicial forum wherein the hearing court is bound by the Constitution of the United States? For to say that the "condition" placed by the hearing court upon the petitioner, as a prerequisite to vacating an illegal and invalid former plea of guilty, was not an act of interfering with the petitioner's free will is to say that the Constitution is not binding on judges in any given situation.

Significantly, the Government's memorandum in opposition argued that the petitioner's plea of guilty was not coerced by the court's participation in the plea negotiations with counsel simply because it occurred prior to the 1975 Amendment to Rule 11 prohibiting such conduct (Appendix, p.55). This reasoning must crumble on the hollow sands of its foundation for it ignores the then extant case law against such a proposition.

The federal view of judicial overreaching, in plea negotiations, has been stated many times prior to 1975. Thus in Euziere V. United States, 249 F.2d 293, 294-95 (1957), the Tenth Circuit Court of Appeals held that:

"Fundamental standards of procedure in criminal cases require that a plea of guilty... be entered freely, voluntarily, and without any semblance of coercion. A plea of guilty interposed as the result of coercion is not consistent with due process.....We think it clear that the statements by the trial court were reasonably calculated to influence the defendants to the point of coercion into entering their pleas of guilty."

This enlightened view was subsequently adopted in United States V. Tateo, 214 F.Supp. 560, 567 (S.D.N.Y. 1963), by Judge Weinfeld where he held that a defendant's constitutional rights "should not be exercised under the shadow of a penalty" that

".....in view of the Trial Court's announced intention, a maximum sentence (would be imposed), and if he pleads guilty, there is the prospect of a substantially reduced term."

Reiterating this reasoning and underscoring the due process violation flowing from judicial plea bargaining the Southern District held, in Elksnis V. Gilligan, 256 F.Supp. 244 (1966), that:

"A judge's prime responsibility is to maintain the integrity of the judicial system; to see that due process of the law, equal protection of the laws and basic safeguards of a fair trial are upheld. The judge stands as the symbol of evenhanded justice and none can seriously question that if this central figure in the administration of justice promises an accused that upon a plea of guilty a fixed sentence will follow, his commitment has an all pervasive and compelling influence in

"inducing the accused to yield his right to trial. A plea entered upon a bargain agreement between a judge and an accused cannot be squared with due process requirements."
(Emphasis added).

And in Brown V. Beto, 377 F.2d 950 (1967), the Fifth Circuit Court of Appeals had occasion to reaffirm the principle that a "trial judge should not participate in plea discussions". (But see Comment, Judicial Plea Bargaining Held Violative of Due Process, N.Y.U.L.Rev. 41, pp. 1209-10 (1966); and Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, U.Chi.L.Rev. 32, PP. 179-80-81 (1964)).

Equally important is the fact that no factual basis was established by the 1971 hearing court before accepting the re-entry of the guilty plea. This is itself is a violation of Rule 11 as it existed in 1971, as well as in conflict with the then prevailing decisional law. In 1971 the relevant portion of Rule 11 read as follows:

"The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Also worthy of note is the fact that in 1969 the Supreme Court held that failure to comply with Rule 11 required that the defendant be given leave to plead anew (McCarthy V. United States, 394 U.S. 460, 22 L.Ed.2d 418, 89 S.Ct. 1166). However, the Supreme Court, shortly thereafter, held that McCarthy's rule would be given prospective application only (Halliday V. United States, 394 U.S. 831, 23 L.Ed.2d 16, 89 S.Ct. 1498 (1969)). Thus where, as

here, a guilty plea is entered after May 5, 1969, the record must demonstrate that the court has personally addressed the defendant concerning his understanding of the charges against him (see United States V. Cody, 438 F.2d 287 (8th Cir. 1971) lawyer's discussion of indictment with defendant does not show that defendant understood the charges), and the consequences of the plea must be explained by the court (Bye V. United States, 435 F.2d 177 (2nd Cir. 1970)), unavailability of parole is a consequence of a plea; United States V. Richardson, 483 F.2d 516 (8th Cir. 1973) knowledge of special parole term necessary ingredient to a guilty plea; Jones V. United States, 440 F.2d 466 (2nd Cir. 1971) maximum possible sentence is a consequence of a plea). In addition, a factual basis for a plea must be shown; though this need not be established by the defendant's own admission. (See North Carolina V. Alford, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970); and United States V. Frontero, 452 F.2d 406 (5th Cir. 1971)).

POINT II

IT IS A DENIAL OF DUE PROCESS OF LAW FOR
THE LOWER COURT TO RULE THAT PETITIONER'S
UNCONTROVERTED SWORN CLAIMS OF JUDICIAL
OVERREACHING WERE HARMLESS ERROR WITHOUT
HOLDING AN EVIDENTIARY HEARING.

In the case at bar the claim, inter alia, is that the plea of guilty entered in 1971 was induced by the psychological intimidation generated by the threats of the court. A conviction on a plea of guilty coerced by the threats of a judicial officer is no more consistent with due process than a conviction supported by a coerced confession. (See e.g., Haynes V. Washington, 373 U.S. 503 (1963), induced to confess under promise to call wife; and Lynum V. Illinois, 372 U.S. 528 (1963), induced to confess under threat that children would be placed in a home).

It is interesting to note that the Supreme Court has long taken the position that the use of an "involuntary" or "coerced" confession in a criminal trial is irreconcilable with due process of law and therefor necessitates reversal, regardless of how much other evidence of guilt remains. (See e.g., Malinski V. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Payne V. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958)). This sound reasoning is founded on the premise that there can be no harmless error where any degree of coercion induces an accused to involuntarily confess his guilt, be it in the stationhouse or in an open court of law.

Similarly, the lower court's position in relying on Rosa V. Follette, 395 F.2d 721 (2nd Cir. 1968), and McGrath V. LaVallee, 348 F.2d 373 (2nd Cir. 1965), as supportive grounds to deny the petitioner is erroneous and untenable.

In Rosa this Court held that:

"As we read the record, however, it is clear that the plea discussions were between the prosecutor and Rosa and his counsel. In no meaningful sense can Judge Gellinoff be said to have participated in the plea negotiations." (Id. at p. 725).

In McGrath this Court relied on its prior decisional language that the judge's remarks were not "an enticement or threat by means of a prior commitment by the judge to the prisoner's sentence, but as merely a fair description of the consequences attendant upon the prisoner's choice of plea, a description which was manifestly essential to an informed decision on (his) part." (319 F.2d 311, 314), in holding on the second appeal that:

"The mere explanations of the alternatives facing the defendant--alternatives already explained by his lawyer--does not support the habeas corpus petitioner's allegations that the judge 'tricked and coerced (him) into pleading guilty by means of false assurances of 'consideration' and a 'shorter sentence' and fear inducing language.'" (Id. 348 F.2d at p. 377).

Moreover, both Rosa and McGrath had been afforded hearings in the lower courts while here the petitioner has been denied that basic requirement that would have conclusively established his claim of judicial overreaching--a claim that has not been denied by the Government nor the court before whom the guilty plea was entered. Hence, a hearing is required.

CONCLUSION

Because of the foregoing reasons the Order appealed from should be reversed and an order entered by this Court directing the district court to hold an evidentiary hearing, or for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

Herbert Sperling

Herbert Sperling #78271
Petitioner-Appellant, pro se

CERTIFICATE OF SERVICE
BY MAIL

STATE OF GEORGIA)
COUNTY OF FULTON)

SS:

HERBERT SPERLING, after being duly by law sworn, deposes and says: that on this day of June, 1977, he mailed a copy of the instant brief and appendix to the United States Attorney's Office for the Eastern District of New York. All of which should constitute sufficient proof of service.

Yours etc.,

Herbert Sperling

Herbert Sperling #78271
Petitioner-Appellant, pro se
PO Box PMB
Atlanta, Georgia 30315

Sworn to before me this
24 day of June, 1977.

R. L. Allen

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

